Filed 4/27/12 P. v. Stewart CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LARRY STEWART, Defendant and Appellant.	B228946 (Los Angeles County Super. Ct. No. BA282606)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Wesley, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Larry Stewart appeals from a judgment following his convictions for murder, robbery, burglary, and unlawful vehicle taking. He contends the trial court erred by declining to give certain requested jury instructions and by denying his motion under *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*). In addition, he contends the court erred in sentencing him. Finding no error, we affirm.

STATEMENT OF THE CASE

A jury found appellant guilty of the murder of Sang Yun Kim (Pen. Code, § 187, subd.(a); count 1),[1] second-degree robbery (§ 211; count 2), second-degree commercial burglary (§ 459; count 3), and unlawful vehicle taking (Veh. Code, § 10851; count 4 [lesser included offense]). The jury found true that appellant committed the murder while engaged in the commission of a robbery and/or a burglary, and that appellant inflicted great bodily injury upon Kim during the commission of the robbery. The jury also found true that appellant had suffered three prior serious felony convictions (§ 667, subd. (a)(1)), that he had four prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he had served a prior prison term (§ 667.5, subd. (b)).

After the trial court declared two mistrials during the penalty phase, the prosecution declined to further pursue the death penalty. The trial court sentenced appellant to state prison for a term of life without parole on count 1, and a consecutive term of 25 years to life on count 4. The sentences for counts 2 and 3 were imposed and stayed. Appellant was ordered to pay restitution to the victim's family and was assessed various fees and fines. Appellant timely appealed.

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

STATEMENT OF THE FACTS

A. *The Murder of the Victim*

Soonie Kim was the widow of the victim, who owned Kimbo's Liquor Store (Kimbo's) in South Los Angeles. Soonie Kim testified she spoke with her husband for the last time during the evening of April 23, 2005. At around midnight, she called her husband at the store, but he did not answer his telephone. Dave Kim, the victim's son, testified his father often kept "a big wad of cash in his pocket," around $5,000.

Ezequiel Vasquez, who was 15 years old in 2005, testified that he was familiar with the victim. On April 24, 2005, at about 11:30 a.m., Vasquez went to Kimbo's. When he entered the store, he noticed some blood on the floor. Vasquez shouted Kim's name a few times. After hearing no response, he went home and told his father and sister to call the police.

Los Angeles Police Officer Jilberto Rendon testified that he responded to a call about Kimbo's on April 24 2005, at about 1:00 or 2:00 p.m. He and his partner, Officer Mark Reed, entered the front doors and eventually found Kim's body in the back of the store. No one was inside the store when the officers entered. Officer Rendon checked Kim's body and found it "cold to the touch." He called for additional police units to set up a crime scene.

Dr. Lisa Scheinin performed the autopsy. She determined that Kim died from strangulation. Scheinin also opined that Kim suffered multiple blunt force injuries to the head and face, which made him vulnerable to being strangled. Kim also had chemical burns on the front of his body, which were probably inflicted while Kim was still alive.

B. *The Police Investigation*

Los Angeles Police Detective Dennis Fanning testified that he was the investigative detective in the case. Detective Fanning and another detective photographed, collected, and preserved the physical evidence at the crime scene. Kim's body was found in a pool of blood, and there was a strong smell of chlorine or bleach near Kim's body. A belt was wrapped around Kim's face and mouth area, and there were drag marks on the ground.

Detective Fanning testified that the store had been ransacked and Kim's wallet was empty. Dave Kim testified that when he did a walk-through of the crime scene with the police, he noticed his father's gray van was not in the parking lot. The next day, he did another walk-through by himself. He noticed that a security camera, a stereo, and some liquor bottles and cigarette cartons were missing.

Kim's gray van was found half a mile from the liquor store. A blue jacket, later identified as belonging to Regina Patterson, was found inside the van. With the assistance of a local resident, Detective Fanning located Patterson, and interviewed her at the police station.

Detective Fanning and another detective then ran into appellant when they went to get something to eat at a local restaurant. Detective Fanning testified he identified himself and tried to detain appellant. Appellant tried to escape, but was eventually arrested and transported to the police station. He was wearing a bloody pair of blue pants, which was booked into evidence.

On April 26, 2005, at about 11:40 a.m., the police conducted a search of appellant's residence pursuant to a warrant. Inside the camper where appellant lived with his girlfriend, Gean Bernardez, the police found crates containing items similar to merchandise sold at Kimbo's, including liquor bottles, candy bars,

cigarettes, lighters, batteries, and snack items. The police also found stereo equipment, a television monitor, and a security camera. A set of keys was found inside appellant's bedroom. The police also seized a bloody pair of black pants and a pair of tennis shoes. Inside the shoes, the police discovered some bloody money. On cross-examination, Detective Fanning testified he observed no bleach stains on appellant's clothing or the clothing seized during the search.

The liquor bottles were fingerprinted and photographed at the scene. Rafael Medina, a forensic print specialist, testified that appellant's fingerprints were found on some of the bottles.

Dave Kim identified the security camera, the television, the store merchandise -- including liquor, cigarettes and food -- and the set of keys as belonging to his father. The set of keys, the crates and liquor bottles, and the van were returned to the victim's family.

Los Angeles Police Department criminalist and serologist Angela Zdanowski testified she collected physical evidence for the investigation. Among other items, she collected (1) a hair found on Kim's body and other hair samples, (2) blood samples from the gearshift of Kim's van, and (3) "sticky lift" shoe print samples from Kimbo's.

Los Angeles Police Department criminalist Linda French testified that she determined that a hair sample found at the crime scene was probably a "negroid scalp hair," although it could also have been from a mixed race individual with "predominately negroid hair characteristics." Appellant is African-American. Los Angeles Police Department criminalist Susan Rinehart conducted DNA testing on the blood samples. She determined the blood on the money, pants, and shoes seized from appellant's camper came from the victim. She also determined that the blood collected from the gearshift of Kim's van came from appellant. Rinehart

further testified that appellant could be a source of minor DNA traces found on the pants and a two dollar bill found in the camper. Los Angeles Police Department criminalist Ronald Raquel testified that he determined that a sticky lift print found at the crime scene could have been made by the right tennis shoe found in appellant's camper.

C. *Witness Statements*

Bernardez testified that she lived with appellant at his mother's house in Los Angeles.[2] Bernandez recalled telling a police detective that two or three weeks before the murder, she heard appellant and "Jamaica," also known as Amfryam Swazey, talking about robbing Kim.[3] According to Bernardez, "the Mexican girl, Iris" was the person who "set up the whole thing really."

Bernardez further testified that on April 24, 2005, she was in the camper when appellant came home around 5:00 a.m. Appellant loaded five milk crates filled with liquor, cigarettes, a camera, and other items into the camper. Bernardez

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[2] Bernandez testified at the preliminary hearing on March 26, 2006, but passed away prior to trial. The prosecution had made a recording of her prior testimony, and this recording was played for the jury.

[3] Swazey did not testify at trial, and the prosecution did not introduce any statements or prior testimony of Swazey. Detective Fanning testified the police had arrested Swazey after receiving information that Swazey had assisted appellant in removing items from the liquor store and had received some money from appellant after the murder. Swazey was eventually released based on a lack of evidence that he was involved in Kim's killing. Detective Fanning testified that when the police first located Swazey, he was wearing a dark-colored t-shirt that had white bleach stains on it. Criminalist Rinehart also testified that Swazey could not be excluded as a source of minor traces of DNA found in the blood on the pants found in the camper. She further testified that Swazey could be excluded as a source of minor DNA traces on the two dollar bill found in the camper.

told the police that appellant said he killed Kim. She also told the police that she saw appellant counting at least $5,000 in cash in front of her.

Jennifer Mishelle Dominguez, also known as Iris, testified she knew appellant because they used drugs together for a few months prior to Kim's murder. She also admitted that she had been convicted of burglary, and that Kim had kicked her out of his store once, for stealing a case of beer. A few days before Kim's death, appellant asked her to pretend to steal an item in order to lure Kim out from behind a protective "plastic shield" so appellant could rob him. Dominguez refused.

On the night of April 23, 2005, Dominguez gambled with appellant and La Ray Nern near Kimbo's. Dominguez won some money gambling. Appellant paid her by pulling out a large wad of money, some of which Dominguez noticed was "a little bit moist."

After they stopped gambling, appellant took Dominguez aside, pulled out a ring of keys, and asked Dominguez if she wanted to make some money. Dominguez asked, "What are you talking about?" Appellant replied, "I'm going to empty the store out tonight." Dominguez asked, "What do you mean? Well, where's [Kim]? You know, how are you going to empty out the store?" Appellant said, "He's in the store." Dominguez asked, "What do you mean?" Appellant replied, "If that Buddha head is not dead, he will be." Appellant asked Dominguez to "load up the van." Dominguez refused, and "had a vision" that Kim was inside his store, "suffering, tied up." Dominguez and Nern then left.

Dominguez testified she called 911from a telephone booth nearby, and reported that something was wrong at Kimbo's. She waited for the police to arrive, but no police unit came to the store.

Later that night, Dominguez ran into a friend, Omar Arvizu. Arvizu told her that when he was at the liquor store, he saw appellant "knock the owner out." Dominguez went into Kimbo's the next day to see if Kim was still alive. She opened the door to Kimbo's and saw "blood everywhere." She walked through the store and saw Kim's body lying motionless on the floor near the back of the store.

Dominguez spoke to the police. She identified appellant from a six-pack of photographs, and wrote a statement summarizing her conversation with appellant about the murder of Kim. She also told the police that appellant was "passing out money to people." Dominguez also reported her conversation with Arvizu to the police. On cross-examination, Dominguez admitted that she gave a "Mexican" who was outside the store $20, so he would not tell anyone that she had gone into Kimbo's prior to the police.

Arvizu testified he told the police that at around 11:00 p.m. on April 23, 2005, he pulled into the parking lot at Kimbo's. He saw an individual, who was standing in front of the liquor store, take a swing at "the guy coming behind him."

Patterson testified that on April 24, 2005, at about 4:00 or 5:00 a.m., she was trying to make money as a prostitute. Appellant walked up to Patterson and arranged "a date." They walked to a gray van that was parked nearby and got inside. Patterson recalled seeing "cases and cases of beer and stuff in it." Appellant was also counting "a lot of money." Appellant was wearing two pairs of pants. When he pulled off one pair of pants, Patterson noticed there was a lot of blood on the second pair of pants. When Patterson asked appellant if he had robbed someone, appellant "just smiled." She asked appellant, "[d]o you know if they all right?" Appellant said he did not know because he had "snapped their neck."

D. *Defense Case*

Appellant did not testify, and the defense presented no witnesses during the guilt phase.

DISCUSSION

Appellant raises four issues on appeal. He contends (1) the trial court erred in declining to instruct the jury on third party culpability, (2) the court erred in declining to instruct the jury on the mental state of an aider and abettor to murder, (3) the court erred in denying his motion under *Trombetta, supra,* 467 U.S. 479, and (4) the court erred in imposing a consecutive sentence on the conviction for unlawful vehicle taking. We address each contention in turn.

1. *Third Party Culpability*

Appellant contends the trial court should have given the third party culpability jury instruction requested by trial counsel, because there was substantial evidence that someone other than appellant killed Kim. The trial court denied appellant's request for a pinpoint third party culpability instruction because it determined there was no "evidence in this case [from] which a reasonable person could conclude that somebody [other than appellant] did this offense, nothing." After reviewing the record, we conclude there was no prejudicial error. (*People v. Posey* (2004) 32 Cal.4th 193, 218 [claim of instructional error subject to independent review].)

A trial court has a duty to instruct on all general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. A court may, however, refuse an instruction offered by the defendant if it is not supported by substantial evidence. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.) In the case of a third party culpability instruction, a defendant must offer evidence that "link[s] the third person either directly or

circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) Evidence bearing on nothing more than a third party's motive or opportunity to commit the crime is insufficient. (*People v. Robinson* (2005) 37 Cal.4th 592, 625; *People v. Hall* (1986) 41 Cal.3d 826, 833.)

Here, counsel contends the following evidence raised reasonable doubt as to appellant's guilt: (1) Bernardez's testimony that Dominguez planned the robbery; (2) Dominguez's testimony that appellant approached her about robbing Kim, and that she walked through the crime scene before the police arrived and paid someone not to mention her presence to anyone else; (3) Rinehart's testimony that she could not exclude Swazey as a source of minor DNA traces found in the blood on the pants found in the camper; and (4) Detective Fanning's testimony that Swazey's t-shirt had bleach stains while defendant's clothing did not. We disagree.

Each piece of evidence, standing alone or in combination, does not raise a reasonable doubt that appellant did not kill Kim. Swazey may have talked with appellant about robbing Kim, but there was no evidence that he actually robbed or participated in the robbery. There was no evidence that Swazey had the motive or opportunity to kill Kim. DNA expert Rinehart's testimony that she could not exclude Swazey or appellant as the source of the minor DNA traces found in the blood on the pants did not create a reasonable inference that Swazey was the probable source. In addition, Rinehart excluded Swazey as a possible source of DNA found on one of the bills seized from the camper. Similarly, the proffered

evidence did not show that Dominguez had a motive to kill Kim, and there was no physical evidence linking Dominguez to the murder.

In any event, any error was harmless beyond a reasonable doubt. First, the third party culpability instruction was duplicative of the jury instructions given on reasonable doubt. (*People v. Hartsch* (2010) 49 Cal.4th 472, 504 [third party culpability instructions add little to the standard instruction on reasonable doubt: "even if such instructions properly pinpoint the theory of third party liability, their omission is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof"].) Here, the jury was instructed on reasonable doubt, and defense counsel argued during closing that persons other than appellant, such as Dominguez and Nern, killed the victim.

Finally, the evidence that appellant killed Kim was overwhelming. He admitted as much to Bernardez, Dominguez, and Patterson: he told Bernardez he killed Kim; he told Dominguez if Kim was not dead, he soon would be; and he told Patterson he had "snapped their neck." He was arrested wearing bloody pants, and his blood was found in Kim's gray van, where he took Patterson for an assignation. Other bloodied items were found in appellant's camper, and the DNA evidence showed the blood belonged to Kim. Finally, a substantial quantity of items from Kim and his store were found in appellant's possession, including a large amount of cash and a set of keys to the store and to Kim's van. On this record, any error was harmless beyond a reasonable doubt.

2. *Aider and Abettor Instruction*

Next, appellant contends the court should have instructed the jury on the mental state required to convict someone as an aider and abettor to murder because

he did not commit the actual killing of Kim. For the reasons stated above, there was insufficient evidence to support the giving of such an instruction. There was no evidence from which a reasonable person could conclude that someone other than appellant killed Kim.

3. *Trombetta Motion*

Appellant contends his *Trombetta* motion should have been granted because certain items -- the crates, liquor bottles, and van belonging to Kim -- that were returned to the victim's family contained exculpatory evidence. We disagree.

In *Trombetta*, the United States Supreme Court held that law enforcement agencies have a duty under the federal due process clause to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*Trombetta*, *supra*, 467 U.S. at p. 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, *supra*, at p. 489; *People v. Beeler, supra*, at p. 976.) When evidence is only potentially useful, the failure to preserve such evidence does not constitute a violation of due process unless the defendant proves bad faith on the part of the police. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57; *People v. Roybal* (1998) 19 Cal.4th 481, 510.)

Here, appellant argued the crates contained possibly exculpatory evidence because appellant "specifically indicated to the investigation officers that the blood of the victim [was] transferred to his pants from the cases used to transport the liquor." During the hearing on the *Trombetta* motion, Detective Fanning, Detective Tommy Thompson, and forensic print specialist Medina all testified that they did not recall seeing any blood on the crates. Detective Fanning also testified

that the liquor bottles were all fingerprinted and photographed before being returned to Kim's family. The trial court credited the police officers' testimony. On this record, the trial court did not err in denying the *Trombetta* motion, as there was no evidence the crates contained anything of exculpatory value and no evidence of bad faith on the part of the officers.

4. *Sentencing on Count 4*

Finally, appellant contends that section 654 prohibited the trial court from imposing a consecutive term for count 4, the unlawful taking of Kim's van. We disagree.

Section 654 prohibits multiple punishments where both offenses arose from the same act or course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.) However, section 654 does not prohibit punishment for different offenses where separate and distinct acts can be established as the basis for each conviction. (*People v. Stoltz* (1961) 196 Cal.App.2d 258, 264.)

In *Stoltz, supra*, 196 Cal.App.2d at page 264, the appellate court affirmed a judgment punishing defendant for both murder and grand theft because "the acts whereby murder was accomplished had ceased before the theft was committed. And the jury could have found that even the design to commit theft arose after the fatal blows had been struck." (*Ibid*.) The court noted that the jury could find that defendant had "rifle[d] the pockets of decedent" and taken decedent's automobile after defendant had clubbed the decedent to death. (*Id*. at p. 263.) Similarly, in this case, the trial judge could conclude that appellant decided to steal Kim's van after killing him inside the store. Indeed, the prosecution argued that the court should impose a consecutive sentence for count 4, because "the taking of the vehicle was for a different purpose other than the murder, robbery or burglary."

On this record, we conclude the trial court did not err in imposing a consecutive sentence on count 4.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.